- ♦ **1(C)(2)** **ADMINISTRATIVE FUNCTION EXCLUSION: APPLICABLE TO ETHICS COMMISSION'S APPLICATION OF LAW TO ETHICS COMPLAINTS, FOLLOWING *DYER V. BD. OF EDUC.*, 216 MD. APP. 530 (2014)**

- ♦ **2(B)** **NOTICE CONTENTS: PERMISSIBLE TO STATE IN WEBSITE NOTICE THAT THE PUBLIC SHOULD CHECK THE WEBSITE AGAIN, WITHIN A STATED PERIOD OF TIME BEFORE THE MEETING DATE, FOR CONFIRMATION AND CLOSED-SESSION INFORMATION**

- ♦ **2(B)** **NOTICE CONTENTS: PERMISSIBLE TO ASK MEMBERS OF THE PUBLIC TO NOTIFY THE PUBLIC BODY IF THEY WISH TO ATTEND A MEETING, WHEN THE PUBLIC BODY'S USUAL MEETING ROOM IS SMALL**

- ♦ **2(D)(1)** **NOTICE METHOD: ADDITIONAL METHODS SHOULD BE USED WHEN A METHOD PERMITTED BY THE ACT IS PROBABLY INEFFECTIVE BY ITSELF**

- ♦ **3(B)** **OPEN MEETING: PUBLIC BODY NOT REQUIRED TO PROVIDE DOCUMENTS USED IN DISCUSSION WHEN STAFF HAD PRESENTED THE MATTER ORALLY**

- ♦ **5(A)** **CLOSED SESSION PROCEDURES: § 3-305 PROCEDURES NOT APPLICABLE TO SESSION CLOSED TO PERFORM ADMINISTRATIVE FUNCTION**

- ♦ **6(B)(2)** **MINUTES: MUST REFLECT RECORDED VOTES**

- ♦ **6(B)(2)** **MINUTES: DESCRIPTION OF ADMINISTRATIVE SESSION MUST LIST PERSONS PRESENT**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at** http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

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February 3, 2015

Re: State Ethics Commission
(Complainants N. Lynn Board, Esq., City of Gaithersburg and Elissa D. Levan, Esq., City of Westminster (consolidated complaints)

N. Lynn Board, Esq., the City Attorney of the City of Gaithersburg, alleges on that city's behalf that the State Ethics Commission ("Commission") violated the Open Meetings Act with respect to six meetings in 2013 and 2014. As will be specified below, Elissa D. Levan, Esq., the City Attorney of the City of Westminster, has joined Ms. Board's complaint as to one aspect of the Commission's October 30, 2014 meeting and added another allegation about that meeting. The City of Westminster has also separately asked us for an opinion as to whether the State Ethics Commission must waive confidentiality in its proceedings on an ethics complaint that the City has made. As we are only authorized to address alleged violations of the Act, we decline that request.

To avoid repetition, we will order our discussion of the allegations by topic.

1. Allegations that the Ethics Commission did not give the notice required by the Act

The Act requires a public body to give "reasonable advance notice" of its meetings and to include in that notice the date, time, and place of the session, and, "if appropriate," a statement "that a part or all of a meeting may be conducted in closed session." § 3-302 (a), (b).[1] The Gaithersburg complaint alleges that the Commission violated the Act by failing to give adequate notice of the six meetings and to specify in its meeting notices that parts of the meetings would be closed to the public. The Commission changed its notice practices shortly before the complaint was filed. We will address both sets of practices.

Formerly, the Commission sent meeting notices, which included tentative agendas, to four newspapers that cover its activities regularly: the Baltimore Sun, the Washington Post, the Washington Times, and the Daily Record.[2] The Commission states that it believed that this notice fell within the methods permitted by the Act. The Commission's agendas typically listed the items scheduled for the meeting, such as "Executive

[1] Statutory references are to the General Provisions Article of the Maryland Annotated Code (2014). The Act is posted at: http://www.oag.state.md.us/Opengov/Openmeetings /10_1_14_OPEN_MEETINGS_ACT.pdf.

[2] The Commission either did not generate or did not retain any transmittal letter that would support its statement that it sent the notices and agendas to the four newspapers. Complainant Board infers from that fact that the Commission's statement is inaccurate. While we do not draw that inference, the lack of that documentation prevents us from assessing the timeliness of the notices for all but the October 30, 2014 meeting, for which staff could remember the date they mailed the notice. In order to assure the public, and us, that notice has been timely, public bodies should keep with their copy of a notice some form of documentation as to how and when it was published. For notices published online, we suggest that public bodies include, on the notice, the date of posting and then retain a print-out of a screen-shot.

Director's Report," "Enforcement Matters," "Local Government," and "Informal [Advice] Matters," each with the time the Commission expected to reach it. The agendas listed the times at which the Commission expected to reach matters that "are confidential" and stated that others "may be confidential in whole or in part." Additionally, the Commission posted on its website the dates of its meetings for each year, along with the information that the meetings "generally" began at 9:30 a.m. and "usually" were held at the Commission's offices. Finally, the Commission sent notices to the entities or people whose matters were on the agenda for the Commission's discussion.

The Commission still takes the steps described above, but it has now added this notice to its website:

> The Commission will publish a public agenda which can be accessed from this page 5-7 days prior to each meeting. Because of the confidential nature of certain matters considered by the Commission, some portions of each meeting will normally be closed to the public, as indicated on the public agenda.

We begin with the Commission's past and current methods of posting notice. The Act permits a public body to give notice by: publication in the Maryland Register, if the public body is a unit of State government; or "delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part"; or "any other reasonable method." § 3-302(c) (1), (2), (4). The Act permits other methods—posting notice on the internet or at a "convenient location"—so long as the public body has given public notice of the method. § 3-302(c)(3).[3] The Act thus provides public bodies with the flexibility to use a method that will reasonably get the word out to the public, reasonably in advance. In any event, the notice must be "in writing" whenever that is "reasonable," and the public body must retain a copy for "at least 1 year after the date of the session." § 3-302 (b), (d).

Given the Act's overall goal of "reasonable advance notice," we generally "look at each element in the context of the others." 9 *OMCB Opinions* 146 (2014). Thus, "a deficiency in one regard may sometimes be ameliorated by the public body's extra efforts in another, as when a public body takes extra measures to publish a last-minute notice of an urgently-called meeting." *Id*. And, much depends on the circumstances; a method that works for a local public body, such as posting a notice on a bulletin board in a central place, might not work for a statewide public body. So,

[3] In 6 *OMCB Opinions* 15, 16 (2008), we found that a notice on a public body's website that notices would be given on that website met this condition. Nonetheless, a public body that begins to post notices only on a website, assuming that to be reasonable for those interested in its activities, should also use its usual methods to alert the public to the change.

although use of any one of the methods specified in the Act has long been viewed as compliance with the Act *per se*,[4] we have increasingly encouraged public bodies to review their notice methods, to reasonably adapt them to the changing ways in which their interested public gets information, and, if possible, to use several methods. *See, e.g.*, 7 *OMCB Opinions* 237, 239 (2011).

The Commission's method of sending complete notices only to the newspapers, while perhaps compliant with the Act in a literal sense, was not by itself an effective way of giving the public, in advance, the information that the Act requires—the date, time, place of the meeting and the possibility that part of the meeting might be closed. The website posting, while it gave advance notice, was not complete, and the notification to affected persons was not given to the general public. From a practical perspective, those methods, when viewed cumulatively, only barely met the overall reasonableness standard that we have found implicit in § 3-302. However, the Commission has recognized that its notice practices were less than ideal, and it has added a method, also expressly permitted by the Act, of publishing a complete notice to the general public. Under the circumstances viewed as a whole, we do not find that either set of practices violated the Act.

As to content and timing, we will briefly address the Commission's current practice of generally alerting the public in advance of its meeting dates, instructing the public that its tentative agenda will be posted within five to seven days of each meeting, and then posting meeting information and an agenda that specifies the sessions that the public may not attend. In our view, this practice meets the letter and the goals of the Act. And, in our view, the public is better served by this two-step provision of information than by one early notice that is phrased in terms that might be changed later and that provides little detail about the times at which the public will

[4] In 1993, we found that a municipal public body had sufficiently given notice when it announced its next meeting date at a meeting attended by "two newspapers," the complainant in that matter, and "other citizens of [the town]." 1 *OMCB Opinions* 33 (1993). We stated that the "presence of the press . . . meant that . . . the announcement was in substantial compliance." In 2 *OMCB Opinions* 27, 29-30 (1998), we found that a press release that "was sure to reach representatives of the news media who cover Garrett County affairs" was sufficient notice of a meeting of the County commissioners. By 2008, we were cautioning that delivery of unpaid notices to a newspaper, when relied on as the only means of notice, might not be a reliable method because the newspaper might not publish the event. We advised that, "to avoid this situation, a public body should ordinarily not use delivery of notice to the news media as its sole means of giving public notice." 6 *OMCB Opinions* 32, 33 (2008). Nonetheless, we applied the Act according to its terms and found that the public body's use of that method did not violate the Act. *Id*. We noted that the public body had since developed a website that it had begun to use for notices.

be excluded.[5] Of course, if the meeting date, place, or approximate time changes, the Commission should post the change as soon as that decision has been made.

Finally, as to content, the Gaithersburg complaint alleges that the Commission's notice that some agenda items "are confidential" does not meet the requirement of § 3-302(b)(3) that meeting notices, "if appropriate, include a statement that a part or all of a meeting may be conducted in closed session." The Commission, in response, states that it has used this wording for a long time, believes it to be clear, and is prepared to change it if we so advise. We find that the Commission did not violate § 3-302(b)(3) by using this wording; the fact that particular agenda items were labeled "confidential" substantially conveyed the message that the public was not welcome to observe those discussions. In any event, the Commission now states, more precisely, "Because of the confidential nature of certain matters considered by the Commission, some portions of each meeting will normally be closed to the public, as indicated on the public agenda."

2. Allegations that the Commission's meeting place is too small to accommodate the public and that access to the room is limited by a receptionist

Both Complainants allege that when they were admitted to the Commission's meetings, staff had to arrange chairs to provide them with a seat. They do not state that they were excluded from any meeting because the room was too small. They also question the fact that their only access to the meeting room was through a reception area, where they were asked to wait. They suggest that access to a public meeting should not be controlled in this way.

A preliminary question here is whether the sessions from which Complainants were excluded were subject to the Act; if not, we lack the authority to address the adequacy of the meeting room. The Act does not

[5] The Gaithersburg complaint states that the Commission's provision of notice to the newspapers by mail seven days in advance of the October 30, 2014 meeting was untimely because the Commission had scheduled the meetings well before it sent that notice. In addressing the Act's requirement that notice be given reasonably in advance, we have stated that "the touchstone of 'reasonableness' is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting." 5 *OMCB Opinions* 83, 84 (2006). Applying that standard in 6 *OMCB Opinions* 32, the matter that the complaint cites, we questioned the timeliness of a notice delivered to newspapers six days in advance when that was the only method used, and we stated that such short notice would have been untimely if the public body had known "weeks" in advance that it would meet that day. Here, however, the Commission had posted its meeting dates online well in advance and had notified the persons and entities of the dates on which their matters would be addressed. This is not a case in which a public body kept secret the dates of its meetings.

apply when a public body is meeting solely to perform an "administrative function," as defined by the Act. See §§ 3-103(a) (defining the scope of the Act); 3-101(b) (defining "administrative function"). In *Dyer v. Board of Education of Howard County*, 216 Md. App. 530 (2014), the Court of Special Appeals confirmed our long-held understanding that an ethics commission's proceeding on an ethics complaint is "administrative" in nature and thus not within the stated scope of most provisions of the Act.[6] In the interest of giving guidance on access to the meeting place, we will assume, without finding, that these particular sessions were subject to the Act.

With regard to the choice of a meeting place, we have said that a public body "would violate the Act if it had reason to expect a large crowd but nevertheless deliberately chose to meet in too small a place when a suitable, larger space was available." 3 *OMCB Opinions* 118, 120 (# 01-9, 2001). Here, it does not appear that anyone was excluded from the Commission's meetings because of space limitations. We find no violation of the Act with regard to the meeting room. In case the Commission's improved method of giving notice yields larger audiences, we note that many public bodies without regular access to large meeting rooms routinely include in their meeting notices a request that people who are interested in attending the meeting notify the public body in advance. That way, the public body can make arrangements for an unusually large crowd.

With regard to the Complainants' delayed admittance to meetings, we note from the Commission's written closing statements that it closed the six meetings cited by the Gaithersburg complaint to address matters that the State Ethics laws requires it to keep confidential. It is thus not surprising that a member of the public who arrives during a meeting might learn that the Commission is at that moment holding a meeting that the person may not attend. The logistical question is how to ensure that the public is not excluded when the closed session is over and the open session has resumed, as one complainant had the impression that she had been excluded past the Commission's discussion of a confidential matter. Some public bodies simply hang a "closed session in progress" sign on the door to the meeting room and remove it when the closed session is over; others close the door to exclude the public and open it when the public may enter. In any event, so long as the public is promptly admitted when the closed session is over, the Commission's method does not violate the Act.

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[6] With regard to the Commission's review of local ethics ordinances, the Commission's regulations provide that it shall: "[m]ake decisions regarding exemptions and modification in open public meetings." COMAR 19A.04.03.03. The Commission's regulations also provide, "the Commission shall meet in open session in accordance with the provisions of the Open Meetings Law . . . ." COMAR 19A.01.01.03. We do not know whether that language means that the Commission intends to follow the Act's procedures at meetings to which the Act does not apply, or, instead, that the Commission intends simply to underscore its undertaking to conduct its business in accordance with the Act when the Act does apply. That question lies with the Commission; both intentions are commendable.

We find that the Commission's practices did not violate the Act with regard to the access it provided to its meeting room. We encourage the Commission to develop a routine that will avoid giving the appearance to members of the public that their presence is unwelcome.

3. Allegations that the Commission did not provide copies of documents that it was discussing

Westminster's city attorney alleges that she asked to see documents that the Commission was discussing during its October 30, 2014 meeting on her client's matter and that the Commission declined her request on the grounds that the documents were protected by the attorney-client privilege. She states that documents discussed in an open meeting must be made public. The Commission responds that the Act did not require it to provide the documents during the meeting and that it provided them to her that day by e-mail.

We have not interpreted the Act to require public bodies to provide to the public copies of documents used in meetings. In 4 *OMCB Opinions* 67, 70 (2004), we advised generally that, "[a]t a minimum, a public body considering an item in open session must ensure that those observing the meeting have the same information that someone reading the minutes from the meeting would have." We applied that principle in 6 *OMCB Opinions* 127 (2009), where we addressed a complaint that county commissioners had signed contracts during a public meeting without identifying the contracts to those in attendance. The commissioners' practice was to describe the contracts in their meeting minutes. We stated that, "if the Commissioners wish to sign contracts during the course of a public meeting, the public must be advised of the action being taken so that they are aware of the information that has traditionally been reported subsequent to the meeting through the minutes." *Id.* at 138. And, in 2 *OMCB Opinions* 78, 79 (No. 99-15, 1999), we addressed whether the Act entitled a member of the public to a copy of a draft report during the meeting that a task force was holding to consider whether to adopt the draft as its final report. We stated: "The right of the public to observe the conduct of business at an open meeting does not include a right under the Act to obtain documents (except for the minutes and any tape recordings of the meeting)." There, we agreed with the proposition stated in the Attorney General's Open Meetings Act Manual 11 (3d ed. 1997) that "even if members of a public body refer to certain documents at a public meeting, the Open Meetings Act does not require that the documents themselves be made public; the status of the documents would be determined by other law." *Id*.

In short, the Act did not require the Commission to waive the attorney-client privilege. The Act did require the Commission to provide members of the public in attendance with at least the information that would be later reported in the minutes: the item being considered and any action taken. *See* § 3-306(b). Sometimes, the easiest way for a public body to achieve that goal is to distribute copies of the documents under consideration. That is not the only way. Here, the minutes show that staff orally briefed the

Commission on the matter before it, that the Commission heard the city attorney on the matter, and that the Commission announced its decision.

We conclude that the Commission did not violate the Act when it declined to provide the city attorney with copies of the documents that staff had provided to the members.

4. Allegations that the Commission did not comply with the Act's requirements for closing a meeting and disclosing the events of the closed session

The Gaithersburg complaint alleges that the Commission closed the six meetings without holding a recorded vote to take that action, without completing the written statement required by the Act ("closing statement"), and without disclosing the events of the closed session. The complaint further states that none of the open-session minutes reflect votes on motions to close. The Commission provided us with closing statements that reflect recorded votes to close. We will address the adequacy of the Commission's disclosures in its minutes, a question that turns partly on the function that the Commission performed in the closed sessions on these six dates.

When a public body wishes to hold a closed meeting to perform a function subject to the Act, the public body may only exclude the public in order to discuss one of the fourteen topics listed in § 3-305(b) and, even so, only if the presiding officer has held the recorded vote, and made the written disclosures, required by § 3-305(d). Afterwards, the public body must disclose, in the minutes of its next open session or of the session it has closed, four items of information about the closed session: the "time, place, and purpose of the closed session"; a "record of the vote of each member as to closing the session"; the citation of the § 3-305(b) exception that permits the closing; and a "listing of the topics of discussion, persons present, and each action taken during the session." *See* § 3-306(c)(2). The Commission's closing statements identify the exception that permits public bodies to close a meeting to comply with a law that "prevents public disclosure" of the matter under discussion. § 3-305(b)(13).

If, instead, the public body has recessed an open session "to carry out an administrative function in a meeting that is not open to the public," the public body need only disclose in its open-session minutes the "date, time, place, and persons present" at the administrative function meeting and "a phrase or sentence identifying the subject matter discussed" there. § 3-104. This is the only provision of the Act that applies to a meeting held solely to perform an administrative function.

As for the events of an open session, a public body that keeps written minutes, as opposed to minutes in the form of live and archived audio or video streaming, must include three pieces of information: each item considered, the action taken on each, and each vote that was recorded. § 3-306(c).

The Commission has provided us with copies of its closing statements for the six dates in question. The statements, signed by the presiding officer, record the votes of the members, in an open session, on a motion to close, and they contain the other information required by the Act for meetings closed under § 3-305. The closing statements show that the closed sessions involved enforcement and ethics advice matters, and the minutes that the Commission has posted describe each matter that the Commission took up during its closed sessions. In accordance with *Dyer*, we find that the function that the Commission performed in those particular closed sessions was administrative. The Commission thus was not required, at least by the Act, either to hold a recorded vote to recess to those sessions or to prepare a closing statement. Given the lack of certainty as to the scope of the administrative exclusion—*Dyer* was issued in March 2014 and there is no other binding precedent on the exclusion—we think the Commission acted prudently in treating these sessions as subject to the Act and the provisions of § 3-305. That the Commission did so, however, does not change the fact that § 3-104, not § 3-305, applies to the complained-of sessions.

So, as to the enforcement and informal advice sessions, the Act did not require the Commission to hold a recorded vote. Nonetheless, it appears from the closing statements that the Commission did hold a recorded vote, and, as the Commission acknowledges, that fact appears only in the most recent set of minutes.[7] We find that the Commission violated § 3-306(c)(iii) as to the first five meetings by not describing the recorded vote in the minutes of the open sessions where those votes occurred.

Seldom do we consider a violation "technical," and we would not downplay the importance of including recorded votes in minutes. For these particular meetings, though, the violation arose out of the Commission's practice of closing its administrative-function sessions under the more rigorous procedures applicable to sessions closed under § 3-305. We hardly want to discourage the Commission's choice of that practice. We think that the Act is well-served by a public body's choice to deliberate and vote on whether to exclude the public just because the Act allows the public body to close the meeting. More importantly, the Commission's practice provides the public with much more information on the administrative functions it serves than would be the case if the Commission performed this function in separate meetings, ungoverned by the Act.[8]

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[7] The December 12, 2013 meeting minutes state simply that the "[m]eeting was closed at 10:15 a.m. to consider confidential advice matters and enforcement matters," and the October 30, 2014 minutes state that the "Commission voted unanimously to close the meeting at 9:45 a.m. . . ."

[8] We recently found that the City of Westminster did not violate the Act when it did not follow the § 3-305 closing procedures to an administrative session conducted after it had adjourned a public session, as the free-standing administrative session was not subject to the Act. The result of that common practice is that the public has no idea what the public body is doing in an administrative session. *See* 9 *OMCB Opinions* 151, 152-53 (2014) (because

As to the post-session disclosures required by § 3-104, we find that they were adequate in all but one regard: the Commission's minutes leave some ambiguity as to the persons present during the closed sessions. Although the Commission's minutes typically begin with a list of the members and staff present at the outset and then identify the staff and others who present information on each matter, the minutes do not specify, in one place, whether everyone identified as present at the outset remained for the closed sessions. A person reading the minutes should be able to ascertain who is in the room during each closed session. However, we do not mean to suggest that the Commission must identify the subject of a confidential complaint or informal advice matter.

Conclusion

As explained above, we have found that the Commission violated the Act when it did not specify in its minutes that its meetings were closed by recorded vote (a practice that the Commission has now changed), and when it did not clearly state whether the people noted as present for its open sessions also attended the closed sessions on those days. We have not addressed the material in the submissions that does not implicate the Act.

We commend the Commission for devising a more effective method of giving notice of its meetings and for treating as subject to the Act the meetings at which it performs solely administrative functions.

Open Meetings Compliance Board

Monica J. Johnson, Esquire
Wanda Martinez, Esquire
Mamata S. Poch, Esquire

Common Council had adjourned, not recessed, before holding the administrative session, the Act did not apply to that session). In that case, we encouraged public bodies to voluntarily disclose the topics of their administrative function meetings.